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Roeben, Volker; Jankovic, Sava

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Unpacking Sovereignty and Self-determination in ITLOS and the ICC: A Bundle of Rights?

Volker Roeben is Professor of Energy Law, International Law and Global Regulation at the University of Dundee, as well as a visiting Professor at the China University of Political Science and Law, Beijing, docent at the University of Turku and adjunct Professor at the University of Houston.



Sava Jankovic is Doctor of International Law (University of Dundee). His interests embrace the issues of statehood, self-determination, and international recognition.



In a short space of time, two international courts have handed down rather dramatic decisions related to the contested issues of self-determination and sovereignty of the Chagos Archipelago and Palestine, which have, for a very long time now, been under the UK and Israeli occupation respectively.

On 28 January 2021, an ITLOS Special Chamber [found](#) that it had jurisdiction to adjudicate upon the dispute between Mauritius and the Maldives concerning the delimitation of the maritime boundary between the two states, concluding that Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago within the meaning of article 74, paragraph 1, and article 83, paragraph 1, of the 1982 UN Convention on the Law of the Sea (UNCLOS). It also found that the UK is not an indispensable party to the proceedings, which would have barred the Chamber from exercising jurisdiction under the so-called Monetary Gold principle.

Shortly after, on 5 February 2021, Pre-Trial Chamber I of the ICC ruled that Palestine is a State Party to the Rome Statute, hence "[t]he State on the territory of which the conduct in

question occurred” within the meaning of Article 12(2)(a) of the Statute and found that the Court’s territorial jurisdiction extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

This comment proceeds on the premise that sovereignty is, in legal terms, a bundle of rights. International institutions, such as the ICC and ITLOS, possess differentiated roles in determining the extent of rights flowing from sovereignty. The effect of ‘institutional determinations’ on sovereign rights is to take certain issues out of the realm of arguable fact into the realm of legal fact. Institutional determinations can in this way be considered as ‘consolidatory’ based on their reliance on these legal facts and drawing further legal implications from it. Institutional determinations may in this way be either constitutive or declaratory of sovereign rights.

This distinctiveness of this ‘institutional’ approach becomes clearer if juxtaposed to Sarah Thin’s critical contribution to this [blog](#). Thin posits that the ITLOS Special Chamber’s judgment did not change the perspective on the territorial sovereignty issues. As she argues, the ITLOS Special Chamber by resorting to the ‘legal effect’ of the ICJ’s AO could not simply extinguish the dispute between the UK and Mauritius. For Thin, the authoritative statements of law (including non-binding AO) do not necessarily have legal effects able to alter the rights or obligations of international legal subjects, especially if the parties to the dispute are different. Moreover, as she correctly observes, the Special Chamber did not unambiguously state that the Chagos Archipelago fell within Mauritius’ territory, but only noted that the ICJ’s conclusions “have implications for the legal status of” the Archipelago. Ultimately, that cannot be any different since the Part XV dispute settlement forms do not have jurisdiction over sovereignty over land.

However, both courts actually make determinations that consolidate the position. The ITLOS Special Chamber did, for one, accept the GA determination as a given and, on that basis, proceeded to spell out an implication. That aspect is the treaty-based right, as the coastal state, to consent to the merits of delimitation around the Chagos. It is Mauritius, not the UK that consents to these effects. In other words, the Chamber *ipso iure* allocates that right to the former. It is on this effect and the underlying conception of sovereignty as a bundle of rights that this comment focuses. This piece first explains the institutional approach towards determining the right to self-determination and status of the Chagos Archipelago and Palestine, that comprises UNGA resolutions, ICJ advisory opinions and the two judicial rulings. The piece then discusses the precise legal effects of these two recent judicial determinations. It finally surveys their initial practical ramifications in states’ reactions and scholarly opinion.

A recent history of institutional determination of self-determination and status in the Chagos Archipelago and Palestine cases

In February 2019, the ICJ issued the [Chagos Archipelago Advisory Opinion](#) (later the CAO) which was a defeat for the UK (see [here](#)). The Court not only spelled out the UK’s obligation to bring an end to its administration of the Chagos Archipelago but also stated that such an

administration constitutes a wrongful act entailing the international responsibility of the UK (paras. 177-178). The Court underlined that the right to self-determination creates an obligation *erga omnes* and all States have to cooperate with each other and comply with the General Assembly's proposals to complete the decolonization of Mauritius, which includes the resettlement of previously expelled Chagossians (paras. 180-181).

The UNGA acted upon the opinion with [Resolution 73/295](#) in May 2019, affirming that all states have an obligation to respect the Chagossians' right to self-determination (para. 2 of the resolution); demanding that "the United Kingdom ... withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months" (para. 3 of the resolution); urging "the United Kingdom... to cooperate with Mauritius in facilitating the resettlement of Mauritian nationals" (para. 4 of the resolution).

On 28 January 2021, the ITLOS Special Chamber heavily relied on the CAO and Resolution 73/295 in its determination of the legal status of the Chagos Archipelago. According to the [Chamber](#), the UK was not deemed an indispensable State Party within the Monetary Gold principle. In the *Monetary Gold* case, the International Court of Justice (ICJ) [stated](#) that it cannot exercise its jurisdiction over a question when a third state's legal interests would ... "form the very subject-matter of the decision". But, so the Chamber opined since the legal status of the Chagos Archipelago has been 'clarified' by the CAO and Resolution 73/295 and there is no longer a sovereignty dispute between Mauritius and the UK (contrary to what the Arbitral Tribunal in the [Chagos arbitral award](#) had maintained). Currently, the UK's claim to territory can be characterized as a 'mere assertion' (para. 243 of the judgment), while its continued administration is a breach of international law (para. 245 of the judgment). Hence it is Mauritius that possesses fishing rights and the right to the benefit of minerals or oil discovered (para. 246 of the judgment). The Chamber, referring to the CAO, emphasized that the detachment of the Chagos Archipelago by the UK from Mauritius in 1965 (3 years before it declared independence) violated Mauritius' territorial integrity, the decolonization process, and that people's right to self-determination (paras. 172- 174 the judgment).

This institutional process involving the UNGA, the ICJ and a specialised court has a parallel in the institutional legal process regarding Palestine's situation, both in terms of hierarchy and outcomes. Namely, in 2004 the ICJ issued the [Wall Advisory Opinion](#) (later the WAO), in which it confirmed that Israel since 1967 occupies illegally Palestinian territories (paras. 73, 78 of the WAO) and recalled UNSC Resolution 242 providing that no territories could be acquired by force and that Israel should withdraw from the occupied territories (para. 74 of the WAO). The ICJ declared that the Palestinians have the inalienable right to self-determination and that Israel by ignoring this right is in breach of the *erga omnes* obligation. It was also in breach of the Fourth Geneva Convention (paras. 155, 159).

[UNGA Resolution 67/19](#) of 9 November 2012, apart from upgrading Palestine's status to non-member observer state (for a debate on whether such a status is tantamount to Palestinian statehood see [here](#) and [here](#)); recalled the WAO, and reaffirmed former resolutions stressing "the need for the withdrawal of Israel from the Palestinian territory occupied since 1967, including East Jerusalem, the realization of the inalienable rights of the

Palestinian people, primarily the right to self-determination and the right to their independent State, and a just resolution of the problem of the Palestine refugees”.

Finally, on 5 February 2021 the Pre-Trial Chamber I of the ICC [determined](#), that the Monetary Gold principle did not apply to require Israeli presence in the case (the ICC is not an inter-State court and Israel was indeed invited but declined to participate), and that Palestine is a State for the purpose of the ICC Statute. The Chamber found it appropriate to resort to Article 31(1) of the VCLT and interpret article 12(2)(a) in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Statute. Moreover, the Pre-Trial Chamber heavily relied upon the UNGA Resolution 67/19, and like the ITLOS Special Chamber, concluded that the subsequent UN legal pronouncements (*mutatis mutandis*) could clarify the entity’s legal status – Palestine has in effect become a State, yet only in relation to accession to treaties (para. 98 of the decision). Still, the Pre-Trial Chamber, also referring to the UNGA Resolution 67/19, noted that the territories of Palestine since 1967 are under Israeli occupation and that the Palestinian people have the right to self-determination and independence in their State of Palestine and on that basis concluded that the Court’s territorial jurisdiction extends to Gaza and the West Bank, including East Jerusalem (paras. 116-123 of the decision).

The effects of the ITLOS Special Chamber’s judgment and the ICC Pre-Trial Chamber’s decision on the legal status of the Chagos Archipelago and Palestine. Sovereignty as a bundle of rights

The ITLOS Special Chamber’s judgement and the ICC Pre-Trial Chamber’s decision contribute towards Palestinian and Mauritian self-determination, yet due to the general lack of competence of the ITLOS and ICC to adjudicate on sovereignty-based issues, their effect requires careful analysis. Indeed, that effect is bifurcated.

This can be explained using the distinction between the two types of effects a legal act can have. Accordingly, an act can be merely declaratory of a pre-existing legal situation. Alternatively, if it creates a new legal situation, then the act can be said to be constitutive.

In the present context, the rulings are both declaratory and constitutive. They have a declaratory effect as to sovereignty as a whole. The ITLOS Chamber refers to the prior UNGA resolutions, with their bindingness as confirmed by the CAO, and then merely states that their effect as to sovereignty is immediate. At the same time, the ITLOS’s Special Chamber remarked that a dispute, which requires the determination of a question of territorial sovereignty, may not be regarded as a dispute concerning the interpretation or application of the Convention under article 288, paragraph 1, of the UNCLOS and that Parties seem to agree with that (paras. 110-111).

The Pre-Trial Chamber also refers to the existing situation in a declaratory manner. As to sovereignty *tout court*, for instance, the ICC Pre-Trial Chamber explicitly pronounced that it is neither adjudicating a border dispute under international law nor prejudging the question of any future borders (para. 113). The Chamber also submitted the ICC is not

constitutionally competent to determine matters of statehood that would bind the international community. In addition, such a determination is not required for the specific purposes of the present proceedings or the general exercise of the Court's mandate (para. 108). According to the Chamber "[t]he territoriality of criminal law [...] is not an absolute principle of international law and by no means coincides with territorial sovereignty" (para. 68).

Yet both rulings then also have a constitutive effect on an aspect of sovereignty manifest in the exercise of a treaty-right. On that aspect they rule constitutively, allocating it to the entity supported by self-determination. In this constitutive sense, the ITLOS Special Chamber rules on and allocates the right of the coastal state to formulate a claim under UNCLOS on the adjacent ocean spaces. For the ITLOS Special Chamber did, accept the GA determination as a given and, on that basis, proceeded to spell out an implication, ruling with constitutive effect on the aspect of sovereignty that is under its jurisdiction. That aspect is the treaty-based right, as the coastal state, to consent to the merits of delimitation around the Chagos. It is Mauritius, not the UK that consents.

With reference to the ICC Pre-Trial Chamber's decision, it similarly did rule with constitutive effect on another aspect of sovereignty. That aspect is the treaty-based right to permit the exercise of ICC jurisdiction over a certain territory. It is a legal right, and it is allocated to Palestine. Admittedly, the ICC Pre-Trial Chamber's decision was supported by a smaller majority than the essentially unanimous ITLOS judgment, where only Judge ad hoc Oxman dissented and on an unrelated ground. It was a 2-1 decision with presiding Judge Kovács [dissenting](#) on Palestine's being considered as "[t]he State on the territory of which the conduct in question occurred" under Article 12(2)(a) of the Rome Statute as well as to the point that the Court's territorial jurisdiction in the situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem. Judge Kovács argued, *inter alia*, that the Oslo Accords, where Palestine transferred jurisdiction to Israel in respect of offenses by Israeli, may constitute the obstacle to the ICC jurisdiction. The dissent sits alongside plenty of [amicus curiae](#) submissions against the ICC jurisdiction.

Both rulings then have very real legal consequences. Those are that the cases may be examined on the merits before the ITLOS and the ICC regarding the maritime boundary between Mauritius and Maldives and the alleged crimes committed in the occupied Palestinian territory since 13 June 2014 respectively.

This is so regardless of the procedural *Monetary Gold* point where there is an apparent divergence between the two courts. In the ITLOS case, the ITLOS Chamber found the issue of sovereignty had been determined and applied the Monetary Gold principle to find the UK not indispensable, while the ICC Pre-trial Chamber found the issue of sovereignty not determined though Monetary Gold not applicable in that context.

How, then, can these rulings be understood against the concepts of sovereignty and self-determination? It is submitted that the courts treat sovereignty as a bundle of rights, rather than as an indivisible whole. Then it becomes possible to identify individual rights from this bundle that re-allocate those. Underpinning these operations is the substantive right to self-

determination of the peoples concerned. The rulings spell out the consequences of that right within the concept of sovereignty.

Ramifications: State practice and scholarly opinions

As this comment has demonstrated, it is the institutional determinations that bring about legal change. The comment now turns to the extra-institutional reception. As a practical matter, it is of course only realistic to remain cautious as to the effects in particular of the Pre-Trial Chamber's decision since several states opposed the Chamber's decision on jurisdiction ([Germany](#), [Australia](#), [Canada](#), [Austria](#), among others). The USA explicitly [declared](#) that Palestinians do not "qualify as a sovereign state" and they should be barred from participating "as a state in international organizations, entities, or conferences, including the ICC". Israel has likewise [questioned](#) the Pre-Trial Chamber's decision, calling the ICC a biased, politicized court and urging other States to respect its sovereign right not to accept the jurisdiction. Israel, as a non-party to the ICC Statute, may argue that it is a complementary court and that Israel itself is able to bring to justice the war perpetrators, including Israeli nationals. However, it remains doubtful whether it will be able to fend off the accusations of offenses concerning Israel's settlement activity in the occupied territories, including, among others, forbidding the transfer of a civilian population into occupied territory (see [here](#)). It is also worth mentioning that the next move (after the ICC Pre-Trial Chamber's decision) belongs to the new ICC Prosecutor.

As regards the ITLOS Special Chamber' judgment, the UK, having been most affected by it, [announced](#) that it does not recognize Mauritius's claim to the Chagos Archipelago (British Indian Ocean Territory) which has been under continuous British sovereignty since 1814. Moreover, the Foreign Office stressed that, as not being a party to the proceedings, the UK is under no requirement to comply with the ruling. This substantially complicates matters and prolongs the sovereignty dispute, at least from the perspective of the UK. It remains to be seen whether 56 states that abstained in the voting for the UNGA Resolution 73/295 (only 6 were against: the US, the UK, Maldives, Australia, Israel and Hungary) will change their opinion after the rather clear confirmation of Mauritius's sovereignty over Chagos by the ITLOS Special Chamber. In a similar manner, international legal scholarship may become more prolific and assertive regarding the UK's prolonged occupation, complementing existing [literature](#).

Conclusions

The following conclusion can be drawn from these two decisions. Self-determination and the intended status of statehood with its concomitant bundle of sovereign rights is a legal fact. That legal fact is determined by institutional processes that comprise the UNGA, the ICJ and international courts under specific treaties, regardless of the facts on the ground, although these may follow. In this constitutive subject-matter, international law is moving closer to an institutional normative order.